NO. 88-2129

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF KENTUCKY

Petitioner

versus

WESLEY N. TURNER III

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF KENTUCKY

FREDERIC J. COWAN
ATTORNEY GENERAL

*JOHN S. GILLIG
ASSISTANT ATTORNEY GENERAL
Capitol Building
Frankfort, Kentucky 40601

IAN G. SONEGO
ASSISTANT ATTORNEY GENERAL

*COUNSEL OF RECORD
FOR PETITIONER

October Term 1988

QUESTIONS PRESENTED

I.

DOES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION COMPEL THE VICTIM OF A SEXUAL OFFENSE TO UNDERGO A SECOND GYNECOLOGICAL EXAMINATION BY A PHYSICIAN SELECTED BY THE DEFENDANT WITHOUT AN ADEQUATE SHOWING THAT THE EXAMINATION IS REASONABLY NECESSARY FOR HIS DEFENSE?

II.

DOES COMPELLING THE VICTIM OF A SEXUAL OFFENSE TO UNDERGO A SECOND GYNECOLOGICAL EXAMINATION BY A PHYSICIAN SELECTED BY THE DEFENDANT, WITHOUT AN ADEQUATE SHOWING THAT THE EXAMINATION IS REASONABLY NECESSARY FOR HIS DEFENSE, VIOLATE THE VICTIM'S RIGHT TO PRIVACY PROTECTED BY THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

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COMMONWEALTH OF KENTUCKY

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Respondent

PETITION FOR WRIT OF CERTIORARI
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COMMONWEALTH OF KENTUCKY

The Commonwealth of Kentucky petitions for a writ of certiorari to review the judgment of the Kentucky Supreme Court in this case.

OPINION BELOW

The opinion of the Supreme Court of Kentucky (Appendix at 1a-21a) is reported as Turner v. Commonwealth, Ky., 767 S.W.2d 557 (1989).

JURISDICTION

The judgment of the Supreme Court of Kentucky was rendered December 15, 1988. The Commonwealth's Petition for Rehearing pursuant to Kentucky Civil Rule 76.32 was denied by Order dated May 4, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth, Fifth, Sixth and the Fourteenth Amendments to the United States Constitution provide:

Fourteenth Amendment
Section 1

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On August 10, 1987, the Fayette County, Kentucky, Grand Jury indicted Respondent Wesley N. Turner III for the offenses of First Degree Sexual Abuse and First Degree Rape of H.T., his four-year-old daughter (Transcript of Record, hereinafter TR, at 2).

On August 19, 1987, the respondent moved for an order directing the Commonwealth to produce, among other things, all results and reports of physical or mental examination and of scientific tests or experiments made in connection with the case (TR 23). On August 25, 1987, the trial court entered an order sustaining this motion (TR 28).

On September 11, 1987, the respondent moved for an order compelling the Commonwealth to produce the above, including results and reports of Dr. Reva Tackett in connection with her examination of the child victim, and to allow the respondent's own expert to examine the child (TR 30-31; Appendix, at 23a-26a). On the same day the trial court denied respondent's motion to allow

his own expert to examine the child over the respondent's oral objection. The written order was entered on October 13, 1987 (TR 65).

At trial the Commonwealth called Dr. Reva Tackett, M.D., who specializes in obstetrics and gynecology (Transcript of Evidence, hereafter TE, at 22). She testified that she examined H.T. on August 6, 1987, and that the genital exam showed injuries to the hymenal ring called transections (TE 24). The exam was performed with the aid of an instrument called a colposcope (TE 23). Dr. Tackett described transections as traumatic injury cuts, interruptions of the hymenal ring, and testified that she found four such transections occurring in the child's hymen at the three o'clock, five o'clock, seven o'clock, and eleven o'clock positions. She stated that these injuries were indicative of penetration injuries into the vaginal area (TE 25). She stated that three of the injuries were likely related to a penile type penetration into the vagina, and that the injury in the eleven o'clock position could possibly have

been external manipulation, such as a finger or other object (TE at 26). In her expert opinion, H.T. had been penetrated by objects that in all likelihood were both a penis and a finger (TE at 27).

Dr. Tackett also testified that the transections could be consistent with straddle-type falls or the insertion by the child of objects into her vagina (TE 31-32). Another physician, who had examined the victim before Dr. Tackett, had found only two transections (TE 39).

H.T. testified extensively at the trial, after being found competent by the trial court, and stated that the respondent put his bottom on her bottom (TE 52). H.T. then took two anatomically correct dolls and touched their bottoms together after asking the prosecuting attorney not to look (TE 53). She testified she had her panties off and that she was lying down (TE 53-54). She answered yes when asked if that "thing" on the male doll touched her, and that it hurt her when asked if it went inside her. She

answered yes when asked if he touched her with his hands, and nodded affirmatively when asked if that hurt (TE 54-55).

The respondent testified, in effect, that the criminal charges were an attempt by his former wife to gain complete custody of H.T. (TE 123-125; 153). He also testified regarding various straddle injuries allegedly suffered by H.T. (TE 154-158).

The jury returned a verdict of guilty on both counts, and respondent was sentenced to five (5) years for First Degree Sexual Abuse and twenty-five (25) years for First Degree Rape.

In a decision rendered December 15, 1988, the Kentucky Supreme Court reversed on the ground that "due process and fairness" (Opinion, at 7a) required the trial court to compel the victim of a sexual offense to undergo a second gynecological examination by a physician selected by the defendant without any showing that the examination is reasonably necessary for his defense. Such an examination, the Kentucky Supreme Court held,

"would have been of material assistance to [respondent] in his cross-examination of Dr. Tackett" (Opinion, at 5a). The Kentucky Court cited no statute or case law, either federal or state.[1/] The only constitutional provision cited was the Due Process Clause of the United States Constitution. The Kentucky Constitution does not have a "due process" clause nor do those words ever appear in that document.

The Commonwealth's Petition for Rehearing, emphasizing that a defendant charged with a sexual offense, particularly against a small child, should have to at least show necessity for the additional procedure, was denied May 4, 1989 (Opinion, at 22a).

REASONS FOR GRANTING THE WRIT

1. This petition presents a conflict among the states' highest courts as to whether the Due Process Clause grants a criminal defendant a right

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1/ Kentucky's Civil Rule 35.01 was cited, but the Kentucky Supreme Court concluded that it was not applicable (Opinion, at 6a).

to compel the child victim of sexual abuse to undergo a second gynecological examination required at the whim of the defendant, and whether such a ruling violates the victim's constitutional right to privacy. It includes a holding by the Supreme Court of Kentucky that the Due Process Clause does not require a trial court to consider whether the defendant should be required to show some necessity for this grant of authority over the unwilling child victim, and, thus, is directly in conflict with recent precedents of this Court. The decision also conflicts with the public policy recognized by this Court and reflected in local and national legislative efforts to reduce the traumatization of child sexual abuse victims by the criminal justice system. Lastly, the petition provides an opportunity for this Court to clarify the constitutional source and relevant due process standard by which the rights of the defendant may be balanced against the privacy rights of the victim of sexual assault or abuse, particularly the child victim.

2. When this case was originally briefed in the Kentucky Supreme Court it was not clear that a federal issue was involved.

Respondent complained that he "found himself struggling to cross-examine Dr. Tackett [the examining physician called by the state]" and that although he succeeded in "tearing down her testimony somewhat," he needed his own expert testimony to establish his defense (Brief for Appellant [Respondent] at 17-18). Respondent claimed that the trial court abused its discretion in refusing to order access to the child victim and that this denied him the right to a fair trial (Id. at 18).

Counsel for respondent relied upon some state rules of procedure and virtually no case law, since he was unable to find a Kentucky case bearing directly upon this issue (Id. at 16).

In reply the Commonwealth pointed the Kentucky Supreme Court to Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (". . . the Confrontation Clause guarantees an opportunity for effective

cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish"), since it was apparent that respondent was making a confrontation/due process argument.

3. When the case was decided the Kentucky Supreme Court found no applicable state rule, statute, or Kentucky constitutional provision compelling the result that was reached. Instead the decision was based upon "due process and fairness" (Opinion at 7a). Although no federal statute or constitutional provision was cited, there is no "due process" clause in the Kentucky Constitution, nor do these words appear anywhere in that document. The Kentucky Supreme Court further noted: "[t]he critical question is whether the evidence sought by the [respondent] is of such importance to his defense that it outweighs the potential for harm caused by the invasion of the alleged victim's privacy" (Opinion, at 6a-7a). It concluded that the victim's right to privacy was outweighed by the respondent's right of due process (Opinion, at 7a).

4. The Kentucky Supreme Court's invocation of "due process", was also a shorthand method for addressing Sixth Amendment Confrontation Clause concerns. As its rationale for requiring the second examination the Kentucky Supreme Court opined that "[i]n any event, the examination of the alleged victim by an independent expert and consultation with that expert as to the results of the examination would have been of material assistance to the respondent in his cross-examination of Dr. Tackett." Emphasis added. (Opinion, at 5a.). The Kentucky Supreme Court required no showing or even allegation that there is a need for the second examination; it is available at the whim of the defendant. This due process right to privacy analysis ignored recent decisions by this Court dealing with the balancing of the rights of witnesses/victims and a defendant's right to discovery and confrontation. . . . See, e.g., Delaware v. Fensterer, supra; Pennsylvania v. Ritchie, 480 U.S. 39 (1987); and Kentucky v. Stincer, 482 U.S. 730 (1987). The result reached by the Kentucky

Supreme Court is not compelled by the Due Process Clause of the United States Constitution, and violates the victim's Fourth Amendment right to privacy.

5. The case most indicative of respondent's "due process" right is Pennsylvania v. Ritchie, supra, which is also a Sixth Amendment confrontation, Fourteenth Amendment due process case. In Ritchie the defendant in a child sexual abuse case sought to compel the production of certain state records relating to the child victim. The defendant claimed that without discovery of these records he would be denied effective cross-examination. Although initially framed in terms of cross-examination, this Court, analyzed and decided the issue using Fourteenth Amendment due process analysis. Ritchie, 480 U.S. at 56. Rejecting Ritchie's claim that defense counsel should be provided unlimited access to the material, this Court held:

> We find that Ritchie's interest (as well as that of the Commonwealth) in ensuring a fair trial can be protected fully by requiring that the CYS files be

> submitted only to the trial court for in camera view. . . . To allow full disclosure to defense counsel in this type of case would sacrifice unnecessarily the Commonwealth's compelling interest in protecting its child abuse information. . . . Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim. A child's feelings of vulnerability and guilt, and his or her unwillingness to come forward are particularly acute when the abuser is a parent. . . . The Commonwealth's purpose would be frustrated if this confidential material had to be disclosed upon demand to a defendant charged with criminal child abuse, simply because a trial court may not recognize exculpatory evidence. Neither precedent nor common sense requires such a result.

(480 U.S. at 60-61.)

The due process analysis of the Kentucky Supreme Court is directly in conflict with the due process analysis of this Court in Ritchie and cases such as Delaware v. Fensterer (cited in Ritchie, 480 U.S. at 51 and 53).

6. In Winston v. Lee, 470 U.S. 753 (1985), the Court held that a compelled surgical procedure pursuant to a Virginia state court's order to remove a bullet from a criminal suspect's chest violated the suspect's right to be secure in his

person and the search would be "unreasonable" under the Fourth Amendment. The court noted that "[t]he overriding fuction of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the state." Id., at 760; citing Schmerber v. California, 384 U.S. 757, 767 (1966). The court further noted, "[T]he [Fourth] Amendment's 'proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner.' [Schmerber] 384 U.S. at 768. . . . Another factor is the extent of intrusion upon the individual's dignity interests in personal privacy and bodily integrity." Winston v. Lee, supra, at 760 and 761. The Court concluded by noting,

> "[T]he Fourth Amendment's command that searches be 'reasonable' requires that when the state seeks to intrude upon an area in which our society recognizes a significantly heightened privacy interest, a more substantial justification is required to make the search 'reasonable." Id., 470 U.S. at 767.

The Court also referred to its decision in Rochin v. California, 342 U.S. 165, 174 (1952), in which the Court invalidated a search for narcotics by using an emetic to induce vomiting, and held the search and seizure unconstitutional under the Due Process Clause of the Fourteenth Amendment as violating the individual's interest in 'human dignity.'" Winston v. Lee, supra, 470 U.S. at 762 fn.5.

7. The decision of the Kentucky Supreme Court is also in conflict with most of the states. The majority of those considering the issue have rejected the grant of a due process right, to be exercised by the defendant at will, in favor of permitting such an examination only upon a showing of necessity.

a. A number of states have recognized the discretionary power of the trial judge to order a victim of sexual abuse or rape to undergo testing, either physical or psychological, even though the victim is unwilling to submit. See, i.e., State v. Jerousek, 121 Ariz. 420, 590 P.2d 1366 (1979); Thompson v. State, 394 A.2d 194 (Del. 1974); State v. Filson, 101 Idaho 381, 613 P.2d 938 (1980).

b. Each of the states, however, requires the defendant to make a showing of necessity.[2/] In State v. Ramos, 533 A.2d 1059 (R.I. 1989), the child witness testified to several acts of rape. The examining physician found the victim's hymen to have been stretched far beyond that of a normal thirteen-year old and the physician was "fairly certain" that penetration had occurred. In upholding the refusal of the trial court to compel a second examination the Rhode Island Supreme Court stated:

> In the case at bar defendant sought the trial court's permission to have a gynecological examination performed on a minor. It goes without saying that this type of examination is both intrusive and embarrassing, especially for children. (Id. at 1062).

2/. The importance of modifying the Kentucky Supreme Court opinion to at least require the defendant to make some showing that the second examination was reasonably necessary to his defense was strenuously argued in the Petition for Rehearing which was denied May 4, 1989.

The Court went on to state:

> We hold that a trial justice has discretionary power to require a witness in a criminal trial to submit to an independent physical examination only under the most compelling of circumstances. In situations in which the defendant has shown substantial need and justification and no violation of substantial rights will result, the trial justice has discretionary power to order the complainant to undergo a physical examination. The practice of granting physical examinations of criminal witnesses must be approached with utmost judicial restraint and respect for an individual's dignity.

(Id. Emphasis added). Accord, Lanton v. State, 456 So.2d 873 (Ala. Cr.App. 1984)(denial of defendant's request for second examination based upon "reason to believe" it would show child had not engaged in sex not an abuse of discretion since trial court should grant such a request only in cases of extreme necessity); State v. Filson, supra, (defendant made insufficient showing to compel second gynecological examination); State v. Garrett, 384 N.W.2d 617, 619 (Minn.App. 1986) ("only a rare case would justify such an order [for a second gynecological examination] based upon a showing of compelling need"); People v. Glover, 49 Ill.2d 78, 273 N.E.2d 367, 370 (1971)

(trial court may order physical or psychological examination only "when the defendant presents a compelling reason therefor"); State v. Miller, 35 Wis.2d 454, 151 N.W.2d 157, 165 (1967) ("Because of the possible indignity of such an examination and the natural reluctance of persons to appear as a witness if they were to be subjected to such examination, we believe a strong and compelling reason should appear. . . ."); State v. Holmes, 374 N.W.2d 457, 459 (Minn. App. 1985)(". . . there is no right of a defendant to compel the victim of sexual abuse, especially a child, to submit to a gynecological examination"); State ex rel Wade v. Stephens, 724 S.W.2d 141 (Tex.App. - Dallas 1987)(". . . respondent's controversial discovery order [requesting trial court to order a second physical examination] is not supported by either the federal or state constitution"); Burdette v. Lobban, 323 S.E.2d 601 (W.Va. 1984)(civil child abuse proceeding - trial court may appoint neutral child psychologist or psychiatrist to enquire into child's capacity to testify) (cited in dissenting opinion by Wintersheimer, J., at 20a).

8. The Kentucky Supreme Court's interpretation of the Due Process Clause ignores the devastating effect of untimely, poorly conducted or inappropriate examinations.

The Kentucky Supreme Court's Opinion fails to sufficiently appreciate the strong potential use of such examinations as a means of intimidating and harassing child victims. The Opinion fails to appreciate the victim's constitutionally protected right of privacy. The importance of this question in child sexual abuse cases cannot be overstated. Legislatures all across the country are recognizing the widespread incidence of abused children and are rapidly enacting reforms to reduce the traumatization and intimidation of child victims by the criminal justice system.[3/]

3/ Eastman and Bulkley, Protecting Child Victim/ Witnesses: Sample Laws and Materials (Chicago: American Bar Association, 1986); America's Missing and Exploited Children, U.S. Department of Justice, 1986; Victims of Crime: Proposed Model Legislation, U.S. Department of Justice, 1986.

The effect of the decision in the present case is to increase trauma and intimidation and to chill prosecutions with no positive impact on the fairness of trial.

9. The due process protections sought to be provided by the Kentucky Supreme Court bear no rational relation to their most likely effects. Because of subsequent healing, a later examinationmay have no probative value.[4/] Second, respondent's dispute regarding Dr. Tackett's report concentrated on her interpretation of the condition of the victim's hymen rather than whether her description of the hymen's condition was correct (TE 27-36, 38-40. See Opinion at 4a). Respondent merely needed to submit Dr. Tackett's report to his own expert. An additional examination was not necessary.

4/ Cantwell, "Update on Vaginal Inspection As It Relates to Child Sexual Abuse in Girls Under Thirteen," 11 Child Abuse & Neglect 545, 546 (1987).

In summary, permitting the respondent to dictate to a trial court that the child victim of sexual abuse must undergo further trauma at the hands of a gynecologist of the respondent's own choosing, without any requirement or showing that the additional procedure is reasonably necessary to the defense, is not a requirement of the Due Process Clause, violates the victim's right to privacy under the Fourth Amendment, and is a violation of this Court's precedents. Because of this, the petition should be granted, the judgment reversed, and the case remanded.

10. An analysis of the opinion below and relevant case law refutes any potential claim that the Kentucky decision rests upon an adequate and independent state ground.

a. In Michigan v. Long, 463 U.S. 1032 (1983), this Court held it will assume there are no adequate and independent state court grounds "when it is not clear from the opinion itself" and the decision fairly appears to be interwoven with

the federal law. 463 U.S. at 1042. State courts were advised that a decision need only indicate clearly and expressly that it is based on bona fide separate adequate and independent grounds to avoid review. Id. at 1041. These standards have been reaffirmed in recent cases, e.g., California v. Carney, 471 U.S. 386, 389, n.1 (1985); Caldwell v. Mississippi, 472 U.S. 320, 327 (1985); ("An examination of the decision below reveals that it contains no clear or express indication that "separate, adequate, and independent" state law grounds were the basis for the Court's judgment"); Delaware v. Van Arsdell, 475 U.S. 673, 678, n.3 (1986).

b. The decision below invokes "due process and fairness" without referring specifically to either the United States Constitution or the Kentucky Constitution (Opinion, at 1a-7a). There is, however, no "due process" clause of the Kentucky Constitution nor do these words appear in that document. It is apparent that the invocation

of the Federal Constitution is intended. The Kentucky Supreme Court is well aware that its decisions are subject to this Court's review unless it clearly indicates that a defendant's rights under the Kentucky Constitution are "distinct from, or broader than, respondent's rights under the . . . [Federal Constitution]." Kentucky v. Stincer, supra. The Kentucky Supreme Court declines to adopt the interpretations of other states on the federal constitutional issue but makes no clear and express statement that this conclusion is based on state law. (Opinion, at 7a).

In the same manner, the Supreme Court of Kentucky has relied upon the Federal Constitution in construing the Kentucky Constitution as being identical to, and no more stringent than, the United States Constitution. Jordan v. Commonwealth, 703 S.W.2d 870, 872 (Ky. 1985) (Double Jeopardy Clause identical); Estep v. Commonwealth, 663 S.W.2d 213 (Ky. 1983) (federal construction of

Fourth Amendment adopted; contrary decisions overruled); Newman v. Stinson, 489 S.W.2d 826, 829 (Ky. 1972)(self-incrimination privilege identical); Adcock v. Commonwealth, 702 S.W.2d 440, 441, and at 446-447 (Wintersheimer, J., dissenting) (Ky. 1986)(Kentucky applies federal standard regarding cross-examination limitation). Cf. Gaines v. Commonwealth, 728 S.W.2d 525 (Ky. 1987)(Ky.Rev.Statute 421.350(2) violates Sections 27 and 28 of Kentucky Constitution). The consistent reliance of the Supreme Court of Kentucky on the United States Constitution when interpreting its own Constitution and rules of procedure, as well as its clear invocation of "due process," demonstrate that its decision on this constitutional issue rests primarily on federal law and there is no adequate and independent state court ground.

Because the state court believed federal law required it to decide the case the way it did, this Court has jurisdiction and should grant the petition and review the question presented.

interpreting its own Constitution and rules of procedure, as well as its clear invocation of "due process," demonstrate that its decision on this constitutional issue rests primarily on federal law and there is no adequate and independent state court ground.

Because the state court believed federal law required it to decide the case the way it did, this Court has jurisdiction and should grant the petition and review the question presented.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

FREDERIC J. COWAN
ATTORNEY GENERAL

*JOHN S. GILLIG
ASSISTANT ATTORNEY GENERAL

IAN G. SONEGO
ASSISTANT ATTORNEY GENERAL
CRIMINAL APPELLATE DIVISION
CAPITOL BUILDING
FRANKFORT, KENTUCKY 40601-3494
Telephone: 502/564-7600

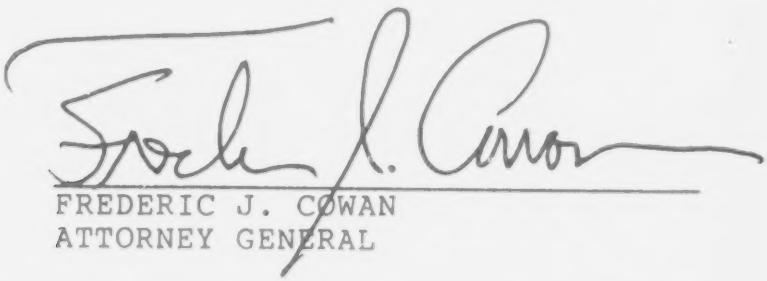
*COUNSEL OF RECORD
FOR PETITIONER

PROOF OF SERVICE

I hereby certify that I caused three copies of the Petition for Writ of Certiorari to be served on counsel for the Respondent by first class mail, postage prepaid, at the following address:

Hon. Robert W. Baxter
Attorney at Law
131 Church Street
Lexington, Kentucky 40507

and that all parties have been served as required by Supreme Court Rules.



FREDERIC J. COWAN
ATTORNEY GENERAL

APPENDIX

TO BE PUBLISHED
RENDERED: December 15, 1988

SUPREME COURT OF KENTUCKY
88-SC-020-MR

WESLEY N. TURNER III — APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE N. MITCHELL MEADE, JUDGE
NO. 87-CR-000383

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION OF THE COURT

REVERSING

The appellant was convicted of first-degree rape and sentenced to 20 years' imprisonment. He was also convicted of first-degree sexual abuse and sentenced to 5 years to be served consecutively with the 20-year sentence.

He contends on appeal that the trial court erred by refusing his motion for a physical examination of the victim by his own experts, by excluding him from a hearing to determine the competency of the alleged child victim to testify, in its finding that the alleged victim was

competent to testify, by failure to grant him a directed verdict on the charge of sexual abuse, and by permitting a conviction on both of the charges which arose out of one single incident.

The alleged victim was the appellant's four-year-old daughter. Her testimony was sufficient to permit a jury to believe that appellant made sexual contact upon her private parts with his hand and that he engaged in sexual intercourse with her. There was no error in the denial of a directed verdict. Likewise, we find no error in the conduct of the competency hearing or in the court's finding of competency.

We must reverse the judgment, however, for two reasons. First, there was only one incident about which testimony was offered. The evidence does not show that the sexual contact between the appellant's hand and his daughter's private parts was distinct and separate from the incident of rape. As far as we can discern from her testimony, physical contact was only incidental to the accomplishment of the rape, and therefore, the

charge of sexual abuse merged into the charge of rape. The conviction of both offenses constituted double jeopardy, and the conviction for first-degree sexual abuse is reversed.

We also hold the denial of appellant's request for a physical examination of the alleged victim was a prejudicial error. Although we uphold the decision of the trial court as to the competency of the four-year-old child witness, and the sufficiency of her testimony to sustain the verdict, we note that her testimony occupied 60 pages of the transcript of record, much of which was rambling, and only a small portion of her testimony, in response to leading questions by the Commonwealth, was sufficient to sustain the conviction.

A most material element in the conviction was the testimony of Dr. Reva Tackett, a gynecologist, who had examined the alleged victim at the request of the Richmond Department of Social Services. She testified that the child, at the time of her examination, had injuries to the hymenal ring at

the 3 o'clock, 5 o'clock, 7 o'clock, 9 o'clock, and 11 o'clock positions. Each of the injuries had healed and had formed scar tissue. Because of the healing, Dr. Tackett could express no opinion as to the age of the injuries.

Dr. Tackett acknowledged that small girls sometimes masturbate or insert foreign objects into their vaginas which rupture the hymenal ring, but she expressed the opinion that some of the injuries to the alleged victim were caused by penile penetration. She reached this conclusion, not from the nature of the injuries, but from their location on the hymenal ring. She testified that injury to the superior position of the ring would likely be caused by digital penetration or by the insertion of foreign objects, but that tears in the posterior section of the ring were probably the result of penile penetration involves entry from the posterior position with the pressure going downward toward the posterior vaginal wall.

Perhaps in the case of sexually active females a vaginal examination, remote in time from an allegation of sexual abuse, would reveal little of probative value as to whether sexual assault had occurred, but in the case of a four-year-old child, evidence of tears in he hymenal ring was a significant circumstance, and testimony that penile penetration caused the injury was a significant incriminating factor.

In this case, the alleged victim was only four years old. The physical examination of the child by an independent expert might have permitted the appellant to offer evidence to contradict that offered by the Commonwealth as to whether there were, in fact, any injuries to the hymenal ring. If such an injury was found, the examination by an independent expert may have enabled appellant to contradict testimony from the Commonwealth that the location of the injuries indicated the probability of penile penetration. In any event, the examination of the alleged victim by an independent expert and consultation with that expert as to the

results of the examination would have been of material assistance to the appellant in his cross-examination of Dr. Tackett.

There does not appear to be any specific rule of criminal procedure concerning physical examination of prosecuting a witness which is directly applicable to this case. RCr 9.46 does permit the appointment by the court of expert witnesses in criminal cases. CR 35.01 provides that when the mental or physical condition of a party or a person in the custody or under the control of a party, is in controversy, the court may order a physical examination. The Commonwealth points out that this rule is not expressly applicable to this case because the four-year-old child is not a party nor is she under the control of a party.

We have approved orders that blood samples be produced for analysis in paternity cases, but this is required by statute, K.R.S. 406.081.

In some cases the physical condition of an alleged victim may, in itself, negate the fact that

a particular crime has been committed. In a case such as this, the critical question is whether the evidence sought by the appellant is of such importance to his defense that it outweighs the potential for harm caused by the invasion of the alleged victim's privacy and the probability that the prospect of undergoing a physical examination might be used for harassment of a prosecuting witness.

We must be vigilant not to open the door to the opportunity for a defendant in a criminal case to invade the privacy of a prosecuting witness or to harass the witness. In this case, a physical examination of the four-year-old child might have disclosed evidence to completely refute the charge, and at the very least, would have been of enormous benefit to the appellant in the conduct of the trial. In our view, this out-weighs the potential for harm above expressed.

In these circumstances and limited to the facts of this case, we hold that appellant, as a matter of due process and fairness, was entitled at

least to have the alleged victim examined by an independent gynecologist in preparation for trial.

The judgment is reversed for further proceedings consistent with this opinion.

Gant, Lambert, Stephenson, and Vance, J.J. concur. Stephens, C.J., concurs in part and dissents in part by separate opinion in which Leibson, J., joins. Wintersheimer, J., dissents by separate opinion.

ATTORNEY FOR APPELLANT:

Robert W. Baxter
131 Church Street
Lexington, KY 40507

ATTORNEYS FOR APPELLEE:

Frederic J. Cowan
Attorney General
Michael L. Harned
Assistant Attorney General
Capitol Building
Frankfort, KY 40601-3494

TO BE PUBLISHED
RENDERED: December 15, 1988

SUPREME COURT OF KENTUCKY
88-SC-020-MR

WESLEY N. TURNER III — APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
V. HONORABLE N. MITCHELL MEADE, JUDGE
NO. 87-CR-000383

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION BY CHIEF JUSTICE STEPHENS
CONCURRING IN PART/DISSENTING IN PART

I join the majority insofar as it reverses appellant's conviction on double jeopardy grounds, and for denial of the appellant's right to a physical examination of the victim. However, I disagree with its finding no error in the conduct of the competency hearing. Appellant's conviction should be reversed because he was excluded, over objection, from an in-chambers hearing conducted to determine the alleged child victim's competency as a witness, in violation of the eleventh section of the Bill of Rights of the Kentucky Constitution.

> In all criminal prosecutions the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor.

Ky.Const.Sec. 11 (emphasis added).

The facts of this case require the Court to reconsider the scope of its holding in See v. Commonwealth, Ky., 746 S.W.2d 401 (1988). That case was this Court's first opportunity to consider the defendant's right to be present during a competency hearing after the United States Supreme Court rendered its decision in Kentucky v. Stincer, 482 U.S. ___, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987). In Kentucky v. Stincer, the Kentucky Supreme Court had reversed the defendant's conviction of sodomy of several children, because his exclusion from the competency hearing violated his right to confrontation guaranteed by both the sixth amendment to the United States Constitution and section eleven of the Kentucky Constitution. Stincer v. Commonwealth, Ky., 712 S.W.2d 939, 940 (1986). The United States Supreme Court granted

certiorari on the sixth amendment grounds, and reversed the Kentucky Supreme Court. Kentucky v. Stincer, 107 S.Ct. at 2666.

> Because [Stincer] had the opportunity for full and effective cross-examination of the two witnesses during trial, and because of the nature of the competency hearing at issue in this case, we conclude that respondent's rights under the Confrontation Clause were not violated by his exclusion from the competency hearing of the two girls.

Id. (emphasis added).

The United States Supreme Court did not hold that a defendant's exclusion from a competency hearing could never violate his or her confrontation rights under the Sixth Amendment. "The appropriate question is whether there has been any interference with the defendant's opportunity for effective cross-examination. No such interference occurred in this case." Id. at 2667 n. 17.

In See, supra, the Kentucky Supreme Court retreated from its still viable position that section eleven of the Kentucky Constitution guaranteed the criminal defendant's right to attend

competency hearings. First, in a feat of linguistic slight of hand, the majority found no significant difference between the confrontation rights guaranteed by the United States Constitutional and the "face to face" meeting with witnesses protected by the Kentucky Constitution. "The drafters of our state constitution did not add the phrase 'face to face' to its protections afforded an accused merely to reconcile an irreconcilable difference." See, 746 S.W.2d at 404 (Stephens, C.J., dissenting).

Second, the majority drew the erroneous conclusion that if this Court held that excluding a criminal defendant from a competency hearing violated the Kentucky Constitution, "we should place ourselves in direct opposition to an opinion of the United States Supreme Court, even though we may have the right to do so as a matter of state law." Id. at 403-03. Choosing not to take this position, the Court found Kentucky v. Stincer controlled and required a finding that a defendant has no right to attend a competency hearing.

As noted above, the United States Supreme Court did not require such a finding; it held instead that Sergio Stincer's constitutional rights were not violated under the circumstances. It took a case-by-case approach, which should have been applied in See. Therefore, this Court would not place itself in direct opposition to a United States Supreme Court opinion if, in an appropriate set of facts, it found a violation of section eleven of the Kentucky Constitution, because such finding under the sixth amendment would not necessarily be inconsistent with Kentucky v. Stincer.

If ever a set of facts demanded reconsideration of this Court's interpretation of section eleven, the case at bar presents them.

> [W]hen a defendant is placed on trial by the state for criminal conduct he is entitled to be present and to assist his counsel at hearings to determine the competency of witnesses against him.

Commonwealth v. Stincer, 712 S.W.2d at 941. Appellant Turner was in a particularly advantageous position to assist his attorney in asking questions

that would have resulted in a more reliable competency determination. Appellant was the alleged victim's father. He knew her background and could have advised his attorney of inaccuracies or untruths in the witness's answers on which to follow-up.

In addition to being excluded from the hearing, appellant was further prejudiced by surrounding circumstances. He and the victim's mother had divorced; custody was granted to the mother. The evidence revealed significant post-divorce discord. For example, appellant's ex-wife admitted on cross-examination that during and subsequent to the divorce she brought three unsubstantiated allegations of sexual and physical abuse. (The divorce judge refused to restrict appellant's visitation on the basis of the claims.) Yet, the mother was permitted to attend the competency hearing, while appellant, the father, was not. The underlying domestic dispute should have aroused sufficient suspicion of coaching the victim to have compelled the trial

court to exclude the mother as well as appellant, if either was to be excluded. A preferable alternative would have been to conduct the competency-to-testify proceeding in open court and before the jury.

The case at bar presents this Court with the opportunity to correct the misleading conclusions drawn in See. If the eleventh amendment to the Kentucky Constitution does not demand that a defendant be permitted to attend competency hearings in all cases; and I would hold that it does unless a defendant waives the right by threatening or other inappropriate behavior; then it at least requires that appellant Turner should have been permitted to attend, given the fact of this case. These facts further support mandating an open court hearing.

> If the hearing to determine whether the child is a competent witness is held in open court in the presence of a jury, it will (1) assist the jury in evaluating the child's truthfulness and (2) avoid the potential for intimidation that results from the intimacy inherent in an in-chambers procedure.

See, 746 S.W.2d at 404 (Stephens, C.J., dissenting) (emphasis in original).

When a defendant is on trial for a serious criminal offense, and faces a lengthy jail term as a possible penalty, as in all criminal prosecutions, he or she had the right to be present and to assist counsel at hearings to determine the competence of witnesses against him. Because the majority refuses to recognize this right, I must dissent from that part of the opinion denying error in the conduct of the competency hearing.

Leibson, J., joins in this concurring in part and dissenting in part opinion.

TO BE PUBLISHED
RENDERED: December 15, 1988

SUPREME COURT OF KENTUCKY
88-SC-020-MR

WESLEY N. TURNER III — APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE N. MITCHELL MEADE, JUDGE
NO. 87-CR-000383

COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE WINTERSHEIMER

I respectfully dissent from the majority opinion because Turner was not entitled to have his own expert conduct a second physical examination of the four-year-old victim.

The majority opinion is on extremely shaky ground in my opinion because it clearly admits that there is not a specific rule concerning physical examination of a prosecuting witness which is directly applicable to this case. Consequently, I can see no legal or logical reason for subjecting this prosecuting witness to further harassment. The trial judge did not abuse his discretion in

refusing the defendant's motion. The majority opinion contains no citation to any Kentucky authority or any other legal authority. It is simply a substitution by a reviewing court of its view of the trial situation for that of the trial judge. There is no basis for such a substitution.

As the majority admits, CR 35.01 provides for a mental or physical examination of a party or a person under the custody or control of a party. This rule is not applicable to this situation. Cf. Wagner v. Commonwealth, Ky., 581 S.W.2d 352 (1979).

The defendant received all that he was entitled to under RCr 7.24(1)(2). Prior to trial, he received all results and reports of physical or mental examinations and of scientific tests or experiments made in connection with the prosecution He had every opportunity to review the examination procedures and findings of the testifying prosecution physician. The defense is surely entitled to an opportunity for effective cross-examination but not cross-examination to

every extent the defense might wish. Delaware v. Fensterer, 474 U.S. 15, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985). A review of the record indicates a thorough and extensive cross-examination by defense counsel. There was nothing to prevent the defendant from having his own expert testify at trial in an attempt to impeach the prosecution witness.

The defendant is not seeking the testimony of medical personnel who have already examined the child for treatment; he seeks examination for the purpose of obtaining evidence and testimony for use at trial. There is no authority to support such a request. Mosley v. Commonwealth, Ky., 420 S.W.2d 679 (1967) does not support the argument of the defendants. Even if a defendant might be entitled to have his own expert examine a child victim, such examination should be allowed only when there is a substantial showing of need or justification or other good cause pursuant to CR 35.01. That is not the situation in this case. The trial court is not to allow a defendant to go on a fishing expedition

that would expose the child victim to additional trauma by means of a second physical examination.

I am persuaded by the legal reasoning of the West Virginia Supreme Court when it determined that "child victims of sexual abuse doubtless have undergone a horrifying experience. For that reason it is necessary to assure the child a modicum of protection." Burdette v. Lobban, 323 S.E.2d 601 (W.Va., 1984). Certainly the accused has the right to employ all the constitutional guarantees in order to defend himself. But by the same token the child victim also has rights to be protected against unrestrained and unnecessary private examination by adverse interests. Burdette, supra. I cannot agree with the majority when it observes that the rights of the accused in this case should outweigh the rights of the innocent victim. There must be a balance between the rights of competing interests and the assessment of the validity of such a balance is best left in the sound discretion of the trial court who has the opportunity to observe all the circumstances surrounding the trial of a case.

Equal justice under law for all is not just a legal cliche. It must have meaning for all persons regardless of gender or age. It is the absolute obligation of reviewing courts as well as trial courts to be fair and to balance all competing rights and interests so as to produce a just result.

SUPREME COURT OF KENTUCKY

No. 88-SC-000020-MR

WESLEY N. TURNER, III — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE N. MITCHELL MEADE, JUDGE
No. 87-CR-000383

COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER DENYING PETITION FOR REHEARING

Appellee's petition for rehearing is denied.

All concur except Wintersheimer, J., who would grant.

ENTERED: May 4, 1989.

/s/ Robert F. Stephens
Chief Justice

FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
SECOND DIVISION

COMMONWEALTH OF KENTUCKY — PLAINTIFF

VS. NOTICE OF MOTIONS — NO. 87-CR-383

WESLEY N. TURNER, III — DEFENDANT

* * * *

Comes the defendant, Wesley N. Turner, III, by counsel, and moves the Court as follows:

1. That the Court direct the attorney for the Commonwealth to permit the discovery or inspection of materials previously ordered to be produced to the defendant by its Order entered herein on August 25, 1987, including the results and reports of physical and mental examinations and of scientific tests or experiments made in connection with this prosecution, and specifically but not limited to, the results and reports of Dr. Reva Tackett in connection with her examination of the alleged

victim herein on August 6, 1987, or at any other time; all books, papers, documents or tangible objects and items of physical evidence known or believed by the Commonwealth to have been used in the commission of alleged crime by the defendant or any other person; to make available to the defendant any evidence that would tend to exculpate the defendant or bear upon mitigation of any punishment he might receive in the within prosecution; to make available for examination and use by the defendant any statements of witnesses in the form of documents or recordings in the possession of he Commonwealth which relate to the subject matter of the witnesses' testimony and which as [has] been signed or initialed by the witnesses, or are or purport to be substantially verbatim statements made by the witnesses, and to grant a continuance herein until the prosecution complys [complies] with said order.

2. In the alternative to prohibit the prosecution from introducing in evidence the above matters not disclosed.

3. To dismiss the within prosecution for failure of the Commonwealth to provide the bill of particulars to defendant as previously ordered bythe Court herein on August 25, 1987 or, in the alternative, to continue the within prosecution until the Commonwealth complies with said Order.

4. To allow the defendant's own experts to examine the alleged victim herein on the ground that the defendant is unable to adequately defend the within prosecution without such examination due to the highly technical nature of the expected testimony of the Commonwealth's expert witnesses.

s/Robert W. Baxter
Attorney for Defendant
131 Church Street
Lexington, Kentucky 40507
(606) 252-1626

The Commonwealth will take notice that the foregoing Motions will be brought on for hearing before the Court on September 11, 1987, in the Fayette County Courthouse, Lexington, Kentucky, at the hour of 10:00 a.m., or as soon thereafter as meets the convenience of the Court.

s/Robert W. Baxter
Attorney for Defendant

The foregoing Notice of Motions was served on the Commonwealth Attorney by delivering a true copy thereof to Hon. Joseph Bouvier, Assistant Commonwealth Attorney, this 11 day of September, 1987.

s/Robert W. Baxter
Attorney for Defendant